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Supreme Court, U.S.
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No. 87-1189

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DOYLE A. MAYS,
Petitioner

vs.

REYNOLDS METALS COMPANY,
a corporation,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION

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23pgs.

QUESTIONS PRESENTED FOR REVIEW

1. Was the lower court correct in finding, under the facts of the case, that Mays' state law claims were preempted by § 301?

2. Was the lower court correct in concluding that failure to raise § 301 preemption at the trial level did not serve as a waiver of § 301 preemption?

LIST OF PARTIES AND STATEMENT REQUIRED BY RULE 28.1

The parties are Doyle A. Mays, Petitioner, and Reynolds Metals Company, a corporation, Respondent. The following are the subsidiaries and affiliates of Respondent:

Subsidiaries

Alpart Farms (Jamaica), Ltd.
Alpart Jamaica Inc.
Alumina Partners of Jamaica
Aluminerie de Becancour Inc.
Aluminio del Caroni, S.A.
Aluminio Reynolds del Peru Sociedad Anonima
Aluminio Reynolds, S.A.
Aluminio Reynolds, Santo Domingo, S.A.
Aluminium Europe S.A., En Abrege: "Aleurope S.A."
Aluminium-Oxid-Gemeinschaft Stade
Aluminium Oxid Stade Gesellschaft mit beschrankter Haftung
Aluminum Corporation of the Philippines (dormant)
Arteaga, Sociedad Anonima, "Arteaga, S.A."
Asociacion Venezolana de Adiestramiento y Desarrollo del Aluminio (AVADAL)
Austria Dosen Gesellschaft mbH & Co. KG
Austria Dosen GmbH
Bevco Containers
Burrstone Associates
Compania Metalurgica Columbiana, S.A. "Comecol"
Egyptian Aluminium Products Company
Envases Valencianos, S.A.
Envases y Alimentacion Madrid, S.A.
Envases y Alimentacion, S.A.
Eskimo Europ, S.a.r.I.
Eskimo Pie Corporation

Eskimo Pie Corporation of Canada, Limited
Gerro Reynolds Dosenwerk GmbH & Co. KG
Halco (Mining) Inc.
Hamburger Aluminium-Werk Gesellschaft mit beschrankter Haftung
Industria Navarra del Aluminio, S.A.
Industrias Lacteas del Yocoima, S.A.
Industrias Metal-Mecanicas del Quindio S.A.
Jamaica Alumina Security Company, Ltd.
Lynx-Canada Explorations Limited
Manicouagan Power Company - La Compagnie Hydroelectrique Manicouagan
Mill Pond Development Corporation
Minas do Dragao Ltda.
Mineracao Rio do Norte S.A.
Mineracao Sao Jorge Ltda.
Mineradora de Bauxita Ltda.
Minerais de Aluminio Ltda.
Montaje de Plantas Montaplan, S.A. (inactive)
New Eastwick Corporation
Nuova Fonderpress S.p.A.
Omnia Minerios Ltda.
Pechiney Reynolds Quebec, Inc.
Phillips-C.B.A. Conductors Limited
Presidential Development Corporation
Presidential Manor Corporation
Presidential Plaza Corporation
Reynolds Aluninio, Sociedad Anonima
Reynolds Aluminium Deutschland Internationale Vertriebsgesellschaft mbH.
Reynolds Aluminium France
Reynolds Aluminium Holdinggesellschaft mgH
Reynolds Aluminum Company of Canada Ltd. - Societe d' Aluminium Reynolds (Canada) Limitee
Reynolds Australia Alumina, Ltd.
Reynolds Kansas City Can Company

Reynolds Metals Development Company
Reynolds Philippine Corporation
Reynolds Regency Corporation
Reynolds Seattle Can Company
Reywest Development Corporation
RMC Holdings (Delaware), Inc.
Ruedas de Aluminio C.A. "RUALCA"
Sherkat Sahami Iran Aluminium
(Iranian Aluminium Co.)
SLIM Cisterna S.p.A.
Superenvases Envalic C.A.
UMCO, S.A.
Union Industrial y Astilleros Barranquilla
"Unial" S.A.
Volta Aluminium Company Limited
Weybosset Hill Development Corporation

Affiliates

Alternative Housing Associates
Becancour Joint Venture
Bennett Manor Associates
Broward Lakes Business Park Joint Venture
Bushnell Plaza Development Corporation
Capitol Hill Associates, Ltd.
Cathedral Square Associates
Cathedral Square Associates II
Chasco Woods Associates, Ltd.
Crown Oak Associates of Penfield
Curtis Apartments Associates
Cypress Courts Associates, Ltd.
Cypress Cove Associates, Ltd.
Drew Gardens Associates, Ltd.
Eastwick Joint Venture I
Eastwick Joint Venture IV
Kimbrook Manor Associates

Lakeside Village Associates
Midtown Associates
Mill Pond Towers Associates
Mount Gibson Joint Venture
The National Housing Partnership
Oceanside Estates Associates, Ltd.
One Empire Plaza Associates
Rayburn Manor Associates
Regency Joint Venture
Regency West Associates
Reynolds Gilbane Realty Associates
The Reynolds-Gilbane-Weybosset Joint Venture
Reynolds Metals Company and Associate, L.P.
Reywest Development Company
Southeast Vinyl Company
Titusville Manor Associates
Windermere Associates, Ltd.
Worsley Alumina Pty. Ltd.
Worsley Alumina Trust
Worsley Joint Venture

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October Term, 1987

DOYLE A. MAYS,
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vs.

REYNOLDS METALS COMPANY,
a corporation,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Reynolds Metals Company, respectfully requests the Court to deny the petition for writ of certiorari seeking review of the judgment of the Supreme Court of Alabama entered in this case on August 21, 1987, rehearing denied, October 23, 1987.

OPINION BELOW

The decision of the Supreme Court of Alabama is not yet reported, but is contained in Petitioner's Appendix.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTE INVOLVED

Section 301, Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT OF THE CASE

On March 14, 1984, on the graveyard shift, someone deliberately started a fire in the general foreman's office at the Reynolds Metals Company plant in Sheffield, Alabama. The arsonist(s) rigged a hose from a gasoline pump to feed this fire with running gasoline. Fortunately, the fire was spotted and extinguished before anyone was hurt. Respondent Reynolds Metals Company ("Reynolds") moved swiftly to investigate this serious threat to its employees and its property. Reynolds immediately sent Raymond Graham, an investigator from its industrial security office in Richmond, Virginia, to Alabama. After conducting his investigation, Mr. Graham reported to local plant management that there were three suspects, one of whom was petitioner Mays. (Tr. 600-05) In his Statement of the Facts, Mays cites evidence to show that he had an alibi. However, information gathered by Graham from other Reynolds employees called that alibi into serious question. (Tr. 566-85, 735-43, 1127-28, 1148-49, 1171-91, 1207-14) In the interest of plant safety, Reynolds decided to suspend the three suspects pending further investigation, including a polygraph examination. (Tr. 1059-60) The three men were notified of their suspension and the date and time to appear for the polygraph by telegram.

One of the three passed the polygraph and was immediately reinstated. Mays and the third employee failed the polygraph. As Mays points out in this Statement of Facts, the polygraph examiner concluded that Mays' "no" answer to the following question was not deceptive: "Did you set the fire in [the foreman's] office?" However, Mays does not add that the polygraph examiner concluded that Mays' "no"

answers to the following questions were deceptive: "Did you attach the rubber tubing to the gas pump nozzle?" "Do you know who set the fire in [the foreman's] office?" "Did you participate in putting gas in [the foreman's] office?" "Did you break the window in [the foreman's] office?" (Tr. 1347-48; R. 361) Mays and the other employee who failed the polygraph were terminated. They were notified of the termination by telegram.

The terms of Mays' employment with Reynolds were governed by a collective bargaining agreement (the "Agreement") between his union and Reynolds. Article XVIII of the Agreement grants to Reynolds "the right to discharge or lay off any employee for sufficient and reasonable cause ...." Article XIX of the Agreement establishes a grievance procedure to be followed in the event of a dispute arising under the Agreement, including a dispute over the termination or suspension of an employee. Article XX of the Agreement provides that any dispute between the parties to the Agreement not satisfactorily resolved by the grievance procedure shall go to binding arbitration. Shortly after his termination, Mays filed a grievance against Reynolds in connection with his termination. The grievance eventually went to binding arbitration after the trial in this case.

Mays filed this defamation action on May 25, 1984. At trial, the evidence against Reynolds consisted of (1) a statement by Mr. Graham, the Reynolds investigator, to another Reynolds employee, whom Graham was questioning in the course of his investigation, that, "he knew, you know, he thought Doyle [the petitioner] was involved in the fire" (Tr. 434) and (2) the communication to Western Union of the two telegrams to Mays which referred to

suspension, "for the purpose of continued investigation regarding arson occurring at the plant." (R. 309, 311)

The trial was held in April, 1985. There were factual disputes regarding Mays' alibi and the facts unearthed by the Graham investigation. There were also factual and legal disputes regarding the applicability and the scope of the Alabama common law of conditional privilege for defamatory statements, including the degree and type of malice required for liability.

The references in Mays' Statement of Facts to trial testimony regarding damages is not complete. That testimony only linked the damages complained of either to the firing of Mays or to a newspaper article with which Reynolds had no involvement. There was no testimony that the damages claimed by Mays were in any way related to the allegedly defamatory statement made by Mr. Graham to the Reynolds employee during his investigation or to the publication of the contents of the telegrams by Reynolds to Western Union. (Tr. 117-27, 217-19, 416-48, 498, 511-29)

The trial resulted in a jury verdict against Reynolds in the amount of $650,000. Reynolds appealed this verdict to the Alabama Supreme Court contending numerous errors in the jury instructions regarding the law of libel and slander and related issues of conditional privilege and malice. Reynolds also contended, for the first time, and based on *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), which was decided after the commencement of the trial in this case, that Mays' state law claim for defamation was preempted by § 301 of the Labor Management Relations Act.

In July, 1985, after the trial in this case, the binding arbitration under the collective bargaining agreement was held. The arbitrator ruled for Mays and reinstated him with back pay and full seniority rights.

In an opinion filed August 21, 1987, the Alabama Supreme Court ruled the § 301 preemption was not waivable and that Mays' claim was preempted by § 301.

REASONS FOR DENYING THE WRIT

I. The Court Should Deny Review of the Preemption Issue

The Court below correctly applied the standards set forth in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), and its progeny to conclude, under the particular facts of the case, that Mays' state law claims were preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("§ 301"). On that basis, as well as the bases presented below, the Court should deny *certiorari*.

A. The Court Has Provided Sufficient Guidance on § 301 Preemption in *Allis-Chalmers v. Lueck*

Less than three years ago, the Court extensively addressed the extent to which § 301 preempts state law tort claims. *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). In *Lueck*, the Court concluded that state law torts are preempted where "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. As discussed below, the lower courts have had no

difficulty in consistently applying that standard. There is no need for further guidance and, hence, no need for the court to grant *certiorari* to revisit this issue.

B. The Determination Of Whether A Particular State Law Tort Claim Is Preempted Under Section 301 Of The Labor Management Relations Act is Dependent On The Facts Of Each Case.

This court recognized in *Lueck* that the determination of whether a particular state law tort claim is preempted under § 301 is dependent on the facts of each particular case and, thus, must be determined by the lower courts on a case-by-case basis. *Lueck*, 471 U.S. at 220. A grant of *certiorari* is singularly inappropriate where the determination of the issue presented -- in this case, premption -- is dependent on the specific facts of the case.

C. There Is No Split Among The Lower Courts

The lower courts have uniformly applied *Lueck* when addressing § 301 preemption; there is no split among the courts regarding the legal standard to be applied. Most courts addressing the issue have concluded, with the court below, that defamation claims, under the facts presented in the particular case, were preempted. *See e.g., Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Gregory v. Simon Brothers, Inc.*, 640 F. Supp. 1252 (N.D. Ind. 1986); *Green v. Hughes Aircraft Co.*, 630 F. Supp. 423 (S.D. Cal. 1985); *Gillis v. Reynolds Metals Co.*, No. CV-84-HM-5319-NW (N.D. Ala. Jan. 27, 1986) *aff'd without op.*, 802 F.2d 1398 (11th Cir. 1986) (*Gillis*

was a defamation suit, filed against Reynolds by another of the three arson suspects, based on the same factual allegations presented by Mays. Under identical facts, the federal district court, affirmed by the Eleventh Circuit, reached the same conclusion as the Alabama Supreme Court in the instant case and held that the claims were preempted.). However, the fact that a court may have reached an opposite conclusion, under the facts of its case, does not create a conflict. It is true, as Mays notes, that the Ninth Circuit has held -- under the facts presented to it -- that a defamation claim was not preempted. *Tellez v. Pacific Gas & Electric Co., Inc.*, 817 F.2d 536 (9th Cir.), *cert denied,* 108 S.Ct. 251 (1987). However, that decision was based on the facts of that case and was not a decision that defamation is never preempted. Thus, *Tellez* does not signal a split in the lower courts on the applicable law.

Mays has tried to create a "certworthy" issue by arguing that defamation is a "particularly abusive" tort that should not be preempted. However, Mays misses the mark. First, defamation is not necessarily "abusive" or malicious, as the facts in the instant case indicate. More importantly, abusiveness is well accommodated in the *Lueck* framework. Certainly the manner in which the tort is committed will bear on the question of whether the evaluation of that claim is "inextricably intertwined" with the rights and duties created by a collective bargaining agreement. However, the presence or absence of malice is simply one of the facts a court should consider in addressing the issue. A mere allegation of malice does not warrant modification of the analysis established in *Lueck*, and does not warrant a grant of *certiorari* in this case.

II. The Court Should Decline Review of the Waiver Issue.

Mays asks the Court to review the determination of the Alabama Supreme Court that Reynold's failure to raise § 301 preemption at the trial court level did not constitute a waiver of that argument. Petitioner seems to have included the issue as an afterthought, for he does little more than assert that the Court should grant *certiorari* because the Alabama Supreme Court resolved the issue incorrectly. Petitioner's posture is thus no different than that of every other party who has lost a case in a state supreme court or a federal circuit court -- he may feel he has a basis for arguing that the lower court erred, but that alone has never been an adequate basis for securing review by the Court.

A. § 301 Preemption Is Not Waivable

Plaintiff's sole contention in support of a grant of *certiorari* on the waiver issue is that the decision of the court below is not supported by this Court's decision in *Internat'l Longshoremen's Assn. v. Davis*, 476 U.S. 380 (1986). In *Davis* the Court concluded that *Garmon* preemption (*San Diego Trade Council v. Garmon*, 359 U.S. 236 (1959)) was in the nature of subject matter jurisdiction, which was not waivable, rather than in the nature of an affirmative defense, which could be waived under state rules of civil procedure. Contrary to Mays' assertion, the decision of the lower court here is consistent with *Davis* because § 301 preemption is in the nature of subject matter jurisdiction.

First, this Court has held that § 301 preemption is extraordinary, having far greater legal effect than an affirmative defense. *Caterpiller, Inc. v. Williams*, 482 U.S. ____, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). As

discussed in that case, a federal affirmative defense to state law claim will not supply subject matter jurisdiction to a federal court, and hence will not support removal of a case from state to federal court. However, § 301 preemption does invest a federal court with subject matter jurisdiction over a complaint asserting only state law claims, making such a case removable. Section 301 preemption operates to "convert[ ] an ordinary state law complaint into one stating a federal claim," and vests original subject matter jurisdiction in the federal courts, justifying removal. 96 L. Ed. 2d at 327. Hence, § 301 preemption is not merely an affirmative defense and is more in the nature of subject matter jurisdiction.

Second, under § 301, arbitration is the primary, preferred and almost universally required forum for the resolution of disputes relating to a collectively bargained employment relationship. With rare exception, a court (state or federal) must defer to the jurisdiction of an arbitrator. See, *Lueck*, 471 U.S. at 219. (And must accord extraordinary deference if called upon to review the decision of an arbitrator *United Paperworkers v. Misco*, ___ U.S. ___, 108 S. Ct. 364, 56 USLW 4011, 4013-14 (December 1, 1987)). Again, § 301 preemption is more in the nature of subject matter jurisdiction than of an affirmative defense.[1]

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[1]Although not cited by Mays, the court in *Johnson v. Armored Transport of California, Inc.*, 813 F.2d 1041 (9th Cir. 1987), reached a different conclusion. However, neither of the above arguments was considered in that case. Furthermore, the plaintiff in *Johnson*, unlike Mays, did not file an arbitration along with his lawsuit and, again unlike Mays, did not win reinstatement, full back pay and seniority rights in arbitration.

B. Review of the Waiver Issue Is Not Warranted

Assuming, *arguendo*, that the court below erred, a grant of *certiorari* would nonetheless be improvident for the following reasons:

First, the case involves only the decision of a state court to waive its local procedural rules in deference to federal labor law; hardly a substantial federal question. Additionally, since the issue has rarely arisen, it does not appear to be a matter of national importance or concern.

Second, because the issue has seldom been addressed, the lower courts have not had occasion to develop a body of law for the Court to consider. That is, the issues have not percolated through the lower courts to be sharpened or defined, and competing considerations have not been weighed or analyzed.

Third, the decision of the Alabama Supreme Court is consistent with federal labor policies favoring uniform application of labor law and resort to the grievance and arbitration machinery as the primary and preferred forum for disputes arising out of the employment relationship. In *Lueck*, which was decided during the trial of the instant case, the Court decided that § 301 preemption could encompass state law tort claims. In reaching that conclusion, the Court noted the "central role of arbitration" and that the "need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in Lucas Flour. [*Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)]" 471 U.S. at 219. Indeed, Mays' rights were vindicated pursuant to an arbitration award reinstating Mays with full back pay and

seniority rights. There is no federal policy favoring "double-dipping."

Finally, state courts are not a final, or even a persuasive, source of federal law. Should the issue arise in the future with sufficient frequency to justify review by the Court, the Court will have a more appropriate opportunity to consider the matter at that time -- when the lower federal courts have analyzed the matter sufficiently to provide a solid foundation for review by this Court. At present, there is no sufficiently important basis to warrant review.

CONCLUSION

Based on the foregoing, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that I have caused to be served three copies of this Brief in Opposition upon Robert W. Walker, Walker & Musgrove Attorneys, 226 West Alabama Street, Florence, Alabama 35630 by causing same to be sent by United States mail, postage prepaid and properly addressed, on this the 25th day of March, 1988.

/s/ John H. Morrow
John H. Morrow
One of the Attorneys for
Reynolds Metals Company,
a corporation